Editor's note: Reconsideration denied by Order dated May 17, 1990

MUSKINGUM MINING CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

DELBERT LACY, INTERVENOR

IBLA 90-171 Decided: March 22, 1990

Petition for permission to appeal interlocutory ruling by Administrative Law Judge Joseph E. McGuire. Hearings Division Docket No. CH 89-1-R.

Petition denied, case remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

   If a party has moved for certification of a ruling
   by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124,
   the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272.
   The Board may grant the petition if the correctness
   of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

2. Administrative Procedure: Adjudication--Evidence: Generally--Rules of Practice: Evidence--Surface
   Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining
   Control and Reclamation Act of 1977: Appeals:
   Generally--Surface Mining Control and Reclamation
   Act of 1977: Hearings: Generally

   A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue
   of whether his mining operation caused damage off the permit is properly denied when the governing law has

> changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

APPEARANCES: David Hardymon, Esq., Columbus, Ohio, for Muskingum Mining Company; Robert Shostak, Esq., Athens, Ohio, for Delbert Lacy, Intervenor; Wayne A. Babcock, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On January 16, 1990, Delbert E. Lacy, Intervenor, filed with the Board a document entitled "Petition for Permission to Appeal an Interlocutory Ruling by an Administrative Law Judge." In the interlocutory ruling at issue, Administrative Law Judge Joseph E. McGuire denied Lacy's motion for summary decision

> with regard to the issue of the causation of the damage on Mr. Lacy's property because that matter has been litigated
> and finally adjudicated [before the Ohio Reclamation Board of Review (RBR)], or in the alternative, that a motion in limine
> be granted limiting any evidence with regard to the causation
> of damage to Mr. Lacy's property because it has been decided.

(Tr. 5, 27 (Sept. 21, 1989, hearing)).

On August 25, 1987, the Ohio Department of Natural Resources, Division of Reclamation (ODR), issued Notice of Violation (NOV) No. 15055 to Muskingum Mining Company (Muskingum Mining), citing the following violation:

> Stream channel enlargement and deposition of sediment has occurred below sediment ponds 071, 080, 081A and 083 beyond the western limits of the permit [Permit D-342] on the William and Delbert Lacy property, below ponds 075 and 076 beyond the eastern limits on Muskingum Mining Inc. property, and below pond 15, southern limits, on the H & D Miller property.

ODR cited the applicable statutes as Ohio Revised Code (ORC) §§ 1513.16(A)(2), 1513.16(A)(10)(e), and 1513.16(A)(20) and the applicable rules as Ohio Administrative Code (OAC) §§ 1501:13-9-04(A)(1) and 1501:13-9-04(F)(1). The ODR inspector described the violation as "[n]on-remedial" for the following reasons:

> (1) he [Inspector Reed] believed that (because of the topography of the downstream areas) more environmental harm
> than good would result from any effort to abate NOV 15055,
>
> (2) he relied upon a Division policy under which the Divi-sion will not require operators to go off the permit area to do reclamation work for a landowner, and

> (3) he had already set forth remedial actions in the related NOVs for sediment accumulation in the ponds and for breached diversions.

(Report and Recommendations of RBR Hearing Officer, Mar. 20, 1989, Conclusion of Law #3, at 10-11).

Muskingum Mining appealed NOV No. 15055 to RBR, which granted Lacy's motion to intervene in that appeal on September 21, 1988. After a hearing and a site visit, the RBR Hearing Officer affirmed the issuance of NOV No. 15055, agreeing that Muskingum Mining's operations had caused the conditions described therein: "Based upon the evidence presented at the hearing I find that the violation cited in NOV 15055 existed on Aug. 25, 1987, and that the damage to the offsite areas was the result of Muskingum's mining operation" (RBR Hearing Officer's Report at 10).

At the hearing, Lacy challenged the irremediable status of the NOV. The Hearing Officer specifically determined that the finding of "non-remedial" was proper, reasoning as follows:

> After viewing the Lacy property, I concluded that the area could never be restored to its precise pre-mining condition. However, I agree with Inspector Reed that the actions of Mother Nature, and the fact that permit D-342 area will soon be totally reclaimed, should improve the condition of the Lacy property and insure against future damage.
>
> It is possible that some actions could be undertaken which might produce some beneficial results. However, the question raised by this appeal is not whether any remedial actions are possible, or what those actions might be. Rather, I must determine whether the Chief [of ODR] acted arbitrarily, capriciously or in a manner inconsistent with law in not requiring such remedial actions. I can not find that the Chief's designation of NOV 15055 as non-remedial was improper. [Emphasis in original.]

(RBR Hearing Officer's Report at 11).

In adopting the findings of fact and the conclusions of law contained in the Hearing Officer's "Report and Recommendation," RBR modified Conclusion of Law #3 by deleting "any reference to Division policy regarding the accomplishment of remedial actions on unpermitted areas" (RBR's Decision in Case No. RBR-4-87-265, dated May 31, 1989, at 2).

Lacy appealed RBR's decision to the Ohio Fifth Appellate District Court of Appeals, raising the following four assignments of error: (1) "reclamation of all lands affected by coal mining and reclamation operations is mandatory under Ohio law;" (2) "Ohio's less stringent standards are preempted by Federal law;" (3) "a mandatory order to abate should have been issued because no exception exists in the law which allows nature to heal itself;"

and (4) "the Reclamation Board of Review's decision was contrary to the weight of the evidence presented at the hearing."

By decision dated January 19, 1990, the Ohio Fifth Appellate District Court of Appeals affirmed RBR's ruling that Muskingum Mining's operation
was the proximate cause of damage to Lacy's property. However, as to the question of whether such damage is irremediable under Ohio law, as RBR concluded, the court stated:

> Although a final, appealable order, the RBR's Decision lacks the clarity and definition required for this court to review the merits of Lacy's appeal. Specifically, the Board's action in "deleting any reference to Division policy regarding the accomplishment of remedial actions on unpermitted areas" * * * demonstrates that the RBR is uncertain as to what exactly is the Division's responsibility in this regard. As vigorously maintained
> by Lacy, R.C. Chapter 1513 and specifically R.C. 1513.16 mandate "that Muskingum repair the offsite damage and mandates that the DOR take enforcement action against Muskingum to do so." (Appellant's brief at 5-6). However, when the reviewing tribunal (the RBR) expunges any reference to remedial actions on unpermitted areas, it leaves unanswered what the duty/responsibility and/or "policy" is regarding this issue of remedial work owed to an injured property owner such as Lacy. [Emphasis in original.]

Lacy v. Muskingum Mining Co., No. CA 89-15, slip op. at 5-6 (Ct. App., 5th App. Dist., Jan. 19, 1990). The court remanded the case to RBR "with instructions to state with particularity what the duty is of the Division of Reclamation as to remedial measures and the enforcement thereof in the case of proven damage to an adjacent landowner such as appellant Lacy" (emphasis in original), and reversed RBR's decision "to that extent." Id. at 6.

On February 27, 1989, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued NOV No. 89-07-253-001 to Muskingum Mining for allegedly "fail[ing] to conduct mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance both in the permit and adjacent areas." The NOV applied to "[s]tream channels from the location of ponds 80, 81A, and 82A to the Muskingum River," which were deemed
to be in violation of OAC § 1501:13-9-04(A) and 30 CFR 816.41(a). Whereas ODR's NOV No. 15055 deemed the situation "non-remedial," OSMRE required a series of steps for "correcting the disturbances which have occurred to the hydrologic balance and establishing measures to minimize future disturbances to the hydrologic balance."

Muskingum Mining filed an application for review of the NOV on March 24, 1989, and an application for temporary relief on April 7, 1989. On June 8, 1989, Muskingum Mining filed an amended application for review. On June 16, 1989, Judge McGuire granted Lacy's motion to intervene.

At the September 21-22, 1989, hearing before Judge McGuire, Lacy orally moved for summary decision pursuant to 43 CFR 4.1125, claiming that the proceedings involving NOV No. 15055 before RBR preclude Muskingum Mining's

introducing any evidence on whether its reclamation activities caused dam-age to Lacy's property, and in the alternative, that Judge McGuire grant
a motion in limine "limiting any evidence with regard to the causation of damage to Mr. Lacy's property because it has been decided" (Tr. 5). Judge McGuire denied Lacy's motions and proceeded to hear evidence on the issue
of causation of damage to Lacy's property.

On September 29, 1989, Lacy filed a motion with Judge McGuire requesting him to certify "the issue of collateral estoppel raised on motion for summary decision or in the alternative motion in limine" to this Board pursuant to 43 CFR 4.1124. Muskingum Mining opposed certification in a memorandum dated October 9, 1989. Judge McGuire has not ruled on Lacy's motion for certification of the collateral estoppel issue. On January 16, 1990, Lacy filed with this Board a petition for permission to appeal Judge McGuire's interlocutory ruling and refiled his motion for summary decision with Judge McGuire.

[1] 43 CFR 4.1124 provides that "[u]pon motion or upon the initiative of an administrative law judge, the judge may certify to the Board a ruling which does not finally dispose of the case if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge." In addition, 43 CFR 4.1272(a) states that "[i]f a party has sought certification under § 4.1124, that party may petition the Board for permission to appeal from an interlocutory ruling by an administrative law judge." The Board may grant the petition "[i]f the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case." 43 CFR 4.1272(c).

In his petition, Lacy "asserts that with the application of the doctrine of collateral estoppel to bar Muskingum Mining relitigating the issue of whether it caused the damage on [his] property, the record below contains no disputed issue of material fact, and [he] is entitled to summary decision as a matter of law" (Petition at 7). Thus, in Lacy's view, Judge McGuire's ruling involves a controlling issue of law, i.e., "whether the doctrine of collateral estoppel bars a party from relitigating in the federal arena an issue finally decided in state surface mining enforcement proceedings,"
the resolution of which "will materially advance final disposition of the instant case." Id. at 7-8.

The doctrines of res judicata and collateral estoppel may apply in the administrative review context. 1/ See generally 4 K. Davis, Administrative Law Treatise, ch. 21 (2d ed. 1983). We note the following distinction between the two doctrines:

1/ In Bernos Coal Co. v. OSMRE, 97 IBLA 285, 297, 94 I.D. 181, 188 (1987), the Board ruled that "the unique Federal/State balance created under [the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982),] manifests a 'countervailing statutory policy' and renders [the] doctrines [of res judicata and collateral estoppel] inapplicable to issues arising in the Federal/State context." See United States v.

> Under the doctrine of res judicata, "a final judgement on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5, 58 L.Ed.2d 552 (1979). [Emphasis added.]

United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980). While the two doctrines are sometimes confused, res judicata is correctly referred to as "claim preclusion," while collateral estoppel is known as "issue preclusion." 4 K. Davis, Administrative Law Treatise, ch. 21.1 (2d ed. 1983). In the instant case, we are concerned with whether, under collateral estoppel principles, Judge McGuire erred in hearing evidence on the issue of whether Muskingum Mining's operations caused damage to Lacy's property.

As stated by the U.S. Court of Appeals for the Eleventh Circuit in Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985), "[i]ssues of fact litigated and decided in a prior administrative proceeding may have collateral estoppel effect on issues of fact presented in a subsequent judicial action." We will evaluate Judge McGuire's interlocutory ruling under the following criteria:

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fn. 1 (continued)
ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980) ("In the absence of 'countervailing statutory policy,' collateral estoppel bars relitigation of factual questions or mixed questions of law and fact.") Moreover, the Board ruled in Bernos that the Tennessee Division of Surface Mining (DSM) was not OSMRE's "virtual representative" during the State proceeding, and thus that OSMRE was not a "privy" to that action. 97 IBLA at 302, 94 I.D. at 191.

In Bernos Coal Co. v. Lujan, No. CIV-3-87-437 (E.D. Tenn. June 6, 1989), the U.S. District Court for the Eastern District of Tennessee reversed the Board's decision in Bernos, ruling that whether SMCRA evinces a "'countervailing statutory policy' which precluded the application of traditional principles of res judicata and collateral estoppel and whether or not the DSM and the OSM[RE] were in privity had already been conclusively determined between the parties in Excello v. Clark [, No. Civ-3-84-902 (E.D. Tenn. Dec. 28, 1984)] and were not open to re-examination by the ALJ." The District Court stated that "[t]he only issue which was properly before the IBLA was whether or not the Tennessee Board's decision that the site had been fully reclaimed had res judicata effect" with regard to OSMRE's NOV. The District Court ruled in the affirmative.

On Aug. 4, 1989, an appeal from the District Court's decision in Bernos Coal Co. v. Lujan was filed with the U.S. Court of Appeals for the Sixth Circuit, where it is currently pending (Docket No. 89-6000).

> [W]hen an administrative body has acted in a judicial capacity
> and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if: (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.

Pantex Towing Corp. v. Glidewell, supra at 1245.

In its February 22, 1990, memorandum opposing Lacy's petition for permission to appeal Judge McGuire's interlocutory ruling, Muskingum presents three reasons as to why the issue before RBR is not identical to the issue before OSMRE. First, Muskingum Mining notes a difference in the scope of the NOV's involved in the respective proceedings. The Ohio NOV cited Muskingum Mining for "stream channel enlargement and deposition of sediment beyond the permit area," while the Federal NOV cited Muskingum Mining for failure to "conduct mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance both in the permit and adjacent areas." (Emphasis in original.) In addition, as previously noted, the Ohio NOV described the violation as "non-remedial," while the Federal NOV set forth rather specific corrective action.

Second, Muskingum Mining asserts that "the law applicable to the Ohio NOV is not the same as the law which is applicable to the federal NOV" (Muskingum Mining Memorandum at 11, emphasis in original). Although both NOV's cite violation of OAC § 1501:13-9-04(A), "that section was amended between the time the Ohio NOV was issued on August 25, 1987, and the time that federal NOV was issued on February 27, 1989." Id. (emphasis in original). According to Muskingum Mining, the effect of this amendment
is to change the applicable legal standard:

> The original regulation provided that mining "shall be planned and conducted to minimize disturbance to the prevailing hydrologic balance in both the permit and adjacent areas." Revised OAC 1501: 13-9-04(A) became effective on September 9, 1988, and now includes several paragraphs of additional language, including a proscription against causing "material damage" to the hydrologic balance outside the permit area. The old provision contained no such qualification. Hence the federal NOV, as written, not only concerns a different geographic area from the Ohio NOV (i.e., the permitted premises, as opposed to adjacent areas) but also applies a different legal standard (i.e., "material damage," as opposed to "minimize disturbance").

Id. at 11-12.

Third, Muskingum Mining asserts that "the simple passage of time itself may evoke a change of circumstances which precludes the application of collateral estoppel." Id. at 12. Muskingum Mining explains as follows:

> Such a situation is present here because a year and a half passed between the times the state and federal NOV's were issued. What the state inspector saw is not the same as what the federal inspector saw; the land in question almost certainly underwent changes completely unrelated to Muskingum Mining's reclamation activities and Muskingum Mining cannot be precluded from introducing evidence concerning whether or not it caused the damage Respondent claims it did. Even assuming arguendo that Muskingum Mining caused some damage to the Intervenor's land in 1987, one cannot automatically assume that Muskingum Mining is responsible for all conditions existing on the land in 1989. This is particularly true in the light of the evidence presented at the hearing before ALJ McGuire that significant natural erosional forces have always been, and continue to be, at work in the subject watershed.

Id. at 12-13.

[2] We agree that collateral estoppel does not bar Judge McGuire from considering the issue of whether the violation cited in OSMRE's NOV caused the damage to Lacy's property. We find equally persuasive Muskingum Mining's second and third arguments. With regard to the amendment to the governing regulation, we note that

> [e]ven where an issue has been actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is generally not precluded where there has been an intervening change in the governing law * * *.

Artukovic v. Immigration & Naturalization Service, 693 F.2d 894, 898 (9th Cir. 1982). We cannot agree with Lacy's contention that the requirement to "minimize disturbance" is the "flip side" of the proscription against causing "material damage," and that the standards involve "a distinction without a difference" (Reply to Muskingum Mining's Memorandum at 3). It is apparent from reading the briefs submitted to the Board concerning Lacy's petition for permission to file this interlocutory appeal that the parties disagree about the effect of the amendment to OAC § 1501:13-9-04(A). It would be inappropriate for the Board to assume that the amendment is meaningless.

We also think the lapse of time between the NOV's issued by ODR and OSMRE, with the attendant changes to the subject property, as argued by Muskingum Mining, renders the doctrine of collateral estoppel inapplicable. It would be improper for us to assume that the condition of the property was the same when ODR and OSMRE issued their respective NOV's, and that Muskingum Mining's operations caused all damage existing when OSMRE issued its NOV. At minimum, Muskingum Mining must be given the opportunity to

litigate the issue of whether its operations caused such damage. See Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979).

We conclude that Judge McGuire properly denied Lacy's motion for summary dismissal and the alternative motion that he restrict the evidence respecting whether Muskingum Mining's operations caused the disputed damage.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we deny Lacy's request for permission to appeal from the interlocutory ruling at issue. The case is remanded to Administrative Law Judge McGuire for further proceedings. 43 CFR 4.1272(h).

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge